NOTES

CONSTITUTIONAL LAW—THE STATUS OF THE IMPORTING INTRASTATE WHOLESALER UNDER THE FAIR LABOR STANDARDS ACT—IN PROSPECT.—The Fair Labor Standards Act of 1938 represents a new federal limitation upon industry in that it endeavors to establish fair wage and hour standards for employees "engaged in commerce or in the production of goods for commerce."[1] The Act provides for an Administrator of the Wage and Hour Division of the Department of Labor who serves in an executive capacity, performing certain functions and duties in relation to furthering the policy of the Act among which is the duty to appoint industry committees for each industry engaged in commerce or in the production of goods for commerce.[2]

The Congress in declaring the policy of the Act states that it "hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of labor conditions detrimental to the maintenance of the minimum standard of living . . ."[3] and in the sections of the Act dealing with minimum wages and maximum hours it is stated, "every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates . . ."[4]

It is evident from the above that the Act seeks to protect employees and is primarily concerned with their welfare and occupational activities as well as secondarily bringing the employer's activities within its scope. Would a strict construction of both provisions lead to the conclusion that an employee, though employed by one engaged in commerce, is not within the scope of the Act unless he likewise in his activity is engaged in commerce or in the production of goods for commerce? May an employee be engaged in commerce even though his employer is not, or once was, and has now ceased such activity? The affirmative of the former question was recognized to a degree by the congress as the Act excludes certain employees from its effect; but an examination of the classification of exemptions[5] reveals a disregard as to certain types of employees who

1. Ch. 676—3 D. Sess. (S. 2375).
2. Sections 4 and 5.
3. Section 2a.
4. Sections 6 and 7.
5. Section 13.

may be engaged in intrastate activities, and if the Congress be consistent should be rightfully excluded.[6] It is the function of the courts to construe and extend the scope of the exemption clause which likely will involve the same difficulties as were presented under the construction of prior federal legislation of which the National Labor Relations Act is a most recent example.[7]

Similarly, Congress has opened a path of laborious effort to the courts in their judicial determination as to what constitutes an industry engaged in interstate commerce or in the production of goods for such commerce. Decisions dealing with commerce under the unconstitutional N. I. R. A.[8] and the constitutional N. L. R. A.[9] will not constitute so pressing a precedent as to be conclusive upon the courts, since under the former the policy was "to remove obstructions to the free flow of interstate and foreign commerce," and under the latter those things "affecting commerce," both of which may be distinguished from the policy of the present Act; yet it is probable that the prior decisions will offer, in conjunction with decisions independent of the Acts, a guiding channel in seeking a proper interpretation of the commerce feature of the present F. L. S. A.

In prospectively seeking the trend of decisions under the F. L. S. A. in relation to importing wholesalers and their subsequent intrastate activity it is necessary to resort to prior cases dealing with the subject matter, and further, to cases dealing with manufacturers' activities, as the recent evolutionary decisions dealing with manufacturers under the N. L. R. A. have expanded and extended the scope of control by the federal government over commerce so that it becomes necessary to examine closely the language employed in allowing or limiting its effect

6. Section 13 exempts "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." * * * Is there any logical reason for not including within this provision employees of a local wholesaler whose occupational activities are primarily those of preparing for sale and selling the merchandise to retailers from their local warehouse and where none of the merchandise is sold without the state? If, as is usual, the wholesaler purchases his goods from without the state, he is there engaged in interstate commerce, but such activity ceases with the stoppage of the goods. Those employees who had nothing to do with the acceptance of the goods were not "engaged in interstate commerce."

7. 48 Stat. 198 (1933) 15 U.S.C. 707.

8. 48 Stat. 195, 196 (1933) 15 U.S.C. 703 . . . declared unconstitutional by A. L. A. Schechter Poultry Corp. v. United States 295 U.S. 495, 79 L. Ed. 1570 (1935).

9. *Supra*, note 7.

upon intrastate wholesalers. Decisions prior to the N. L. R. A., dealing with the state's attempt to tax locally were uniform in their treatment of the subject matter. As early as 1910 when merchandise was transported in interstate commerce to its destination within a state, and there was received by the consignee, and placed by him in a warehouse, it was determined that the interstate character of the shipment had terminated and the subsequent transportation of the goods to various points in the state by the consignee constituted intrastate traffic, thereby permitting state regulation.[10] This would seem to indicate that when the commodity had reached the termination of its journey and had been delivered to the consignee, it ceased to be a subject of interstate commerce and the subsequent shipment from the point at which it had been delivered, to another within the state represented an intrastate shipment.[11] Likewise where gasoline,[12] coal,[13] and natural gas,[14] were imported from without the state and were then sold or came to rest within the state in the possession of the owner, the decisions precluded federal regulation regardless of the fact that the owner intended, after receiving the goods, to forward them ultimately to a destination beyond the state.[15] The stoppage represented more than a mere incidental interruption in the transportation,[16] and while so interrupted, the property became intermingled with the general mass of domestic property.[17]

The Schechter Poultry case in declaring the N. I. R. A. unconstitutional, emphasized the then prevailing view of the Court in prohibiting federal regulation of local matters. The Act was declared unconstitutional primarily on the grounds that it constituted an unlawful delegation of legislative power as well as that The Live Poultry Code of Fair Com-

10. Oregon R. & Navigation Co. v. Campbell, 180 F. 253 (Oregon 1910) *aff'd* 230 U.S. 525.

11. Gulf, Colorado & Santa Fe Ry. Co. v. Texas, 204 U.S. 403, 51 L. Ed. 540 (1907).

12. American Airways v. Wallace, 57 F. 2d 877, *aff'd* 287 U.S. 565, 77 L. Ed. 498 (1932). U. S. v. Superior Products 9 F. (Supp.) 943 (D.C. Idaho) 1935. Atlantic Coast Line R.R. v. Standard Oil 12 F. 2d 541. Cert. den. 273 U.S. 712 (1926). Sonneborn Bros. v. Cureton, 262 U.S. 506, 67 L. Ed. 1095 (1923).

13. Brown v. Houston, 114 U.S. 622, 29 L. Ed. 257 (1895). Susquehanna Coal Co. v. Mayor & Council of South Amboy, 228 U.S. 665, 57 L. Ed. 1015 (1913).

14. Public Utilities Comm. v. Landon, 249 U.S. 236, 63 L. Ed. 791 (1919).

15. Bacon v. Illinois, 227 U.S. 504, 57 L. Ed. 615 (1912).

16. Susquehanna Coal Co. v. Mayor & Council of South Amboy, 228 U.S. 665, 57 L. Ed. 1015 (1913).

17. Brown v. Houston, 114 U.S. 622, 29 L. Ed. 257 (1895).

petition of N. Y. constituted an invalid federal control over employees engaged in intrastate business and not business which "directly affected" interstate commerce. The Court's language is significant in view of the later N. L. R. A. cases,

"the persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their wages and hours have no direct *relation* to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a state and there dealt in as a part of its internal commerce. The mere fact that there may be a constant flow of commodities into the state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local disposition and use."

As a result it seems that an *indirect* burden upon interstate commerce should not be regulated, but how to determine whether a burden was *direct* or *indirect* was not precisely indicated. However, Mr. Justice Sutherland in *Carter v. Carter Coal Co.*[18] clarified, somewhat, the meaning of the test as determined by the Schechter case and stated, "the distinction between a 'direct' and 'indirect' effect turns, not on the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate shipment, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexity of the business, or by all combined." It is evident from the language employed in the Schechter and Carter cases that the Court, at that time, accepted the doctrine that Congress could regulate only situations which affected interstate commerce *directly* and that problems arising out of *local* production or manufacturing had merely *indirect* effects. In line with the foregoing, prior to the Wagner Act cases, the District Courts of New Jersey[19] and Missouri[20] refused to permit regulation of local manufacturing even though the goods were to be shipped to another state, on the ground

18. 298 U.S. 238, 80 L. Ed. 1160 (1936).
19. Acme Inc. v. Bession, 10 F. (Supp.) 1 (D.C. N.J.) (1935).
20. U.S. v. National Garment Co., 10 F. (Supp.) 104 (D.C. Mo.) (1935).

that Congress had no express constitutional power so to regulate, and at most the effect of the local activities upon interstate commerce was remote. To hold otherwise, the courts determined, was to disregard the function of manufacturing, which is transformation, rather than buying, selling, and transportation. All goods, which were manufactured for purposes of interstate commerce would be subject to federal regulation to the complete exclusion of the state, if the opposite result were to be reached.[21]

The Wagner Act brought with it a series of cases which made a substantial inroad upon the prior declarations by the Court dealing with manufacturers and processors. The concept of "a direct or indirect affect upon commerce" was expanded and transformed to permit federal control of situations which under the original test, would have been excluded. The first major Wagner adjudication was presented by *N. L. R. B. v. Jones Laughlin Steel Corp.*,[22] wherein the activities of a large steel corporation in purchasing raw materials from without the state, processing and manufacturing the steel products within the state, and then shipping the finished product in interstate commerce, were held to be subject to federal regulation. The Supreme Court changed its approach to the subject matter in that the test of "directness" of the burden as applied by the Schechter case, which looked primarily to the source of the burden, was displaced, and an activity was judged by its "effect upon commerce" rather than by the character of the activity itself. The result indicates a complete shattering of the Court's prior steadfast refusal to permit federal regulation of purely local matters and it was stated, "although activities may be intrastate in character when separately considered, if they have such a close and *substantial* relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." Evidently the court has utilized the "direct and indirect" test, but the meaning of direct includes situation which "substantially affect" interstate commerce. The Court went on, "In the Schechter case we found that the effect there was so remote as to be beyond the federal power. To find immediacy or directness there was to find it almost anywhere, a result inconsistent with the maintenance of our federal system." While the

21. Hammer v. Dagenhart, 247 U.S. 251, 62 L. Ed. 101 (1918).
22. 301 U.S. 1, 81 L. Ed. 893 (1937).

Court in dealing with the N. L. R. A. lengthened the measuring rod, it specifically declared its refusal to extend the scope of the power of Congress over effects upon interstate commerce which were so "insubstantial" and "remote" that to embrace them would obliterate the distinction between national and local transactions and which would create a completely centralized government.

It is quite apparent that labor disputes during the manufacturing of the steel products might have a *substantial* effect upon the free flow of commerce in either the import into or export from the state of raw materials. And further, if the manufacturing is to be considered a breaking point in the flow of commerce, because it is separate and apart from the transportation thereof, it still would be capable of producing dire effects upon commerce by reason of a general labor dispute. It would seem, therefore, that if the subject matter could result in a "substantial burden" on interstate commerce, it matters not whether the transaction, if considered separately, is a local one. What is "substantial" is a question of degree and each case must be decided upon its own set of facts. The expanded application merely lifts the barrier of the Schechter test if a situation is presented, having within it facts which justifiably may demand the lifting. Whether or not the expansion of the test of the Schechter case has in fact overruled that case on its presented facts is a debatable question.[23] Applying the "substantial effect" test to the importation of poultry and its subsequent slaughtering and local disposition, do the facts represent a situation which is properly included? Would a labor dispute among the employees and their employer create a too remote and "insubstantial" effect upon interstate commerce so as to prohibit federal regulation? If, as the Court has stated, each case must be decided on its facts it is clear that a much weaker case is presented for federal regulation by the Schechter case than was presented in the Jones-Laughlin situation. In the former, interstate movement ceased with the importation of the poultry; whereas

23. GEORGE WASHINGTON L. REV. 436, 447 (1938) and therein cited: Howard, *Is our Constitution Adequate for Present Day Needs* (1937) 23 WASH. U. L. Q. (1) 47, 82 Teple, *Federal Power Over Things Which Affect Interstate Commerce* (1937) 4 Ohio St. L. J. 56, 61-62 Nathanson, *The Wagner Act Decisions Studied in Retrospect* (1937) 32 ILL. L. Rev. 196 . . . "Though the Schechter and Carter cases contained certain expressions which on a superficial reading might have been taken to indicate a contrary conclusion, these cases were easily distinguished away by the Court." Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining.* (1937) 50 HARV. L. REV. 1071, 1091.

in the latter the finished products were exported. While it is conceivable that a local transaction after a one-way interstate commerce movement may be of such nature as would burden the free flow of commerce in a substantial manner, it is not every situation which is so characterized. It is suggested that a one-way interstate commerce movement subsequent to the local activity would constitute, if a labor dispute arise, a more serious threat to the free flow of commerce, than if the local activity be subsequent to the interstate activity. The Jones case expressly prohibits federal regulation of transactions which are too "remote" and of "insubstantial" effect on commerce. Has the Court paid lip service to the doctrine and then by its decision precluded the possibility of putting it into effect? We think not. It is significant to note, that a majority of the cases under the N. L. R. A. involve some portion of the manufactured or processed material being shipped from the state. In *N. L. R. B. v. Fruehauf Trailer Co.*[24] raw material was imported from without the state and transformed and then shipped in interstate commerce. Also in *N. L. R. B. v. Friedman-Harry Marks Co.*[25] raw clothing material was finished into fashioned garments and sent into interstate commerce; and in *N. L. R. B. v. Santa Cruz Fruit Packing Co.*[26] locally produced fruit was processed and packed in California, 39 per cent thereof was to be shipped in interstate commerce.[27] The Court sanctioned regulation in these foregoing cases on the ground that a manufacturer's or processor's activities, although local in nature, might burden interstate commerce. It appears more recently[28] that

24. 301 U.S. 49, 81 L. Ed. 893 (1937).
25. 301 U.S. 58, 81 L. Ed. 893 (1937).
26. 303 U.S. 453, 82 L. Ed. 954 (1938).
27. It is not within the scope of this note to discuss the difficulty the courts have been confronted with in determining the per cent of export and whether any particular per cent is to guide in the determination. The Santa Cruz case rejected the theory of a conclusive definite per cent and in a concurring opinion, Judge Haney held that if 1 per cent of the goods moved in interstate commerce, the effect of labor disputes would be direct. However compare with a more recent case; Milk Control Board of Pennsylvania v. Eisenberg Farm Products 306 U.S. 346, 83 L. Ed. 495 (1939) in which respondent maintained a milk depot where it purchased milk from local farmers and then shipped a small portion of the milk out of the state for distribution. In seeking to escape a statute regulating the local sales of milk, respondent claimed he was engaged in interstate commerce. The court refused to allow this contention and held it was engaged locally as only a small portion of the milk was intended for interstate commerce.
28. N. L. R. B. v. Fainblatt, 306 U.S. 601, 83 L. Ed. 646 (1939). Consolidated Edison Co. v. N. L. R. B., (C. C. Atl. 2d) 95 F. 2d 390 *mdf and aff'd* 305 U.S. 197, 83 L. Ed. 131 (1938).

the doctrine has been further expanded in that even though the manufacturer or processor does not himself ship the goods in interstate commerce, but delivers them to another with knowledge that the goods will be so shipped, the mere non-shipment does not remove them from within the scope of proper federal regulation.

The rationale of the cases arising under the Wagner Act and Schechter and Carter cases is not that in the former there was a continuous flow of interstate commerce through the states and that they were thereby to be distinguished from the Schechter case where goods were transported and then came to rest within the state, and from the Carter case where local products had not yet entered interstate commerce[29] but rather, that Congress' power over commerce is not limited to a transaction where a flow of commerce is present, for burdens and obstructions may be due to action springing from other sources, including labor disputes, irrespective of the origin of material or the place where sales are made.[30]

It is obvious, therefore, that the Schechter case is limited to the extent that a local business may be subjected to the N. L. R. B. if the local activities "substantially affect interstate commerce"; but it does not necessarily follow therefrom that if the Schechter case were now presented to the Court the holding would be contra. Each transaction stands upon its own facts. If any weight be given the language of the Jones-Laughlin case, which refused federal regulation of "insubstantial burdens," there were evidently situations of which the Court was mindful, to which the refusal would apply. Would it not appear that the Schechter case is a proper situation to apply the limitation of the Jones-Laughlin test; *i.e.*, a local situation which is of such *remote* effect upon commerce that it must necessarily be excluded. Those who, because of the Court's treatment of the N. L. R. B. and its broadened jurisdiction, assume a critical attitude, base their criticism primarily upon the assumption that the Court has in effect precluded the states from regulation over purely local matters. For answer, it must also be assumed that the Supreme Court is aware of the necessity of non-encroachment by the federal government and of its sacred duty to preserve the proper balance between the state and federal governments.

It would appear the status of the intrastate wholesaler who pur-

29. Lien: *Labor Law and Relations* P 65, 6.
30. *Supra* (note 26).

chases his goods from without the state and stores them within his warehouse until sold locally, under the N. L. R. A. test, should be excluded rather than included. The possible "substantial effect" upon commerce of a labor dispute among such employees who are engaged in locally dispersing the merchandise, is minute. Here, likewise, is a local transaction which was intended to be excluded by the "insubstantial and remote" limitation. The Fair Labor Standards Act by substituting "engaged in commerce or in the production of goods for commerce" for "affecting commerce" makes a stronger case for the exclusion. It is significant to note that the Administrator in answer to the question "is a wholesaler making all his sales within the state in which he is doing re-wholesaling subject to the provisions of the Act if he purchases the goods which he wholesales from outside the state," required such wholesaler to comply.[31] However in the answer itself, there appears a doubt as to the applicability, and it devolves upon the courts to determine definitely if the application is proper.

The occupation of the employee being of paramount concern, it will be of significance in determining the character of the employee's activities to note the activities of the employer; once it is determined that the employer is "engaged in commerce or in the production of goods for commerce" is it not settled which of his employees is so engaged. "Engaged in commerce" would naturally include those who are engaged in the actual interstate movement, but it is questionable as to whether it applies to stenographers, bookkeepers, etc., whose services are not directly connected with the commerce, yet are essential to its proper functioning.[32]

It is apparent that a strong leaning upon the Wagner Act rulings, as precedent to determine situations arising under the F. L. S. A., would be improper, as under the former an employer could be so engaged that a labor dispute might "substantially affect" interstate commerce, despite the fact that the activity be entirely local; whereas such local activity would not be properly within the provision "engaged in commerce or in the production of goods for commerce" of the latter. Exclusive of the Wagner Act cases, if goods are shipped to a wholesaler, and are stored until a subsequent local sale takes place, the interstate character of the shipment has ceased and his is considered a purely local

31. Questions and Answers No. 5 . . . The policy "when in doubt comply" would be applicable here.

32. 52 HARV. L. R. 646 (1939).

activity.[33] Only those employees who are engaged in the unloading process are engaged in commerce[34] provided that their activity is not delayed for too great a period of time.[35] This is to be distinguished from cases where the wholesaler ships goods to another state or where he receives them from without the state and then in a continuity of shipment preserves the flow of commerce.[36]

The F. L. S. A. provides that certain conditions "leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce."[37] From that section it has been suggested that wholesalers might be considered without the Act as they are not engaged in handling "goods" as defined by the Act and in Sec. 3(1) excludes "goods in the hands of an ultimate consumer not a producer, manufacturer, or processor thereof."[38] The weakness of the suggestion, is that it does not carry with it an explanation as to how a wholesaler may be considered an ultimate consumer.[39]

"Production of goods for commerce" presents little difficulty when applied to the wholesaler who imports a finished commodity and then sells locally. The Act, in this phase would not apply to the wholesaler's activities or to his employees unless the goods were processed or transformed in some manner while in the wholesaler's possession and were then sent into the channel of interstate commerce.

Likewise the "engaged in commerce" portion of the provision should exclude the intrastate wholesaler after the actual delivery to him and only the employees who were assigned the task of unloading the merchandise, if it were encumbent upon the wholesaler to do so rather than upon the vendor, were engaged in commerce. If, by supposition,

---

33. *Ibid* and cases cited therein: Winslow v. Fed. Trade Comm, 277 Fed. 206 (C.C.A. 4th 1921), 258 U.S. 618 (1922). Atlantic Coast Line R. R. v. Standard Oil Co. of Ky., 275 U.S. 257, 77 L. Ed. 270 (1927). Southern Pac. Co. v. Van Hoosear, 72 F. 2d 903 (C.C.A. 9th 1934). Hartford Accident & Indemnity Co. v. Illinois *ex rel* McLaughlin, 298 U.S. 155, 80 L. Ed. 1099 (1936). U.S. v. French, 10 F. (Supp.) 674 (W. D. Mich. 1935) (N. R. A.).

34. *Supra* Note 32 and Puget Sound Stevedoring Co. v. State Tax Comm., 302 U.S. 90, 82 L. Ed. 68 (1937). Pipal v. Grand Trunk W. Ry., 341, Ill. 320, 173 N. E. 372 (1930). *Cert. den.* 283 U.S. 838, 75 L. Ed. 1449 (1931).

35. *Supra* (Note 32) and cases cited therein.

36. *Ibid* and Swift & Co. v. U.S., 196 U.S. 375, 49 L. Ed. 518 (1905). Board of Trade v. Olsen, 262 U.S. 1 67 L. Ed. 839 (1923). See INTERPRETATIVE BULLETIN No. 5 (15 & 16).

37. Section 2.

38. *Supra* Note 32 and therein "EXTRA TIME FOR OVERTIME" *Now Law* (1938) 37 MICH. L. REV. 28, 52.

39. 52 HARV. L. R. 646 (1939). As pointed out by the writer thereof.

the test of the Wagner cases be applied prospectively to the activities by intrastate wholesalers under the F. L. S. A., thereby placing any situation which might "affect commerce substantially" within the scope of the present Act, such activity by the intrastate wholesalers should be properly considered the type of local activity which is allowed, by the test itself, to remain under state regulation.

CONTEMPT OF COURT—LIABILITY OF THIRD PERSONS.—Equity has always maintained that as important and as fundamental as its very existence as a judicial body and its jurisdiction to hear and decide cases, is the accompanying inherent power to exercise such activity as will assure its existence as an effective judicial body. To be effective it must command respect and obedience; it must be able to insure and compel proper and full execution of its decrees and decisions. Today, this is never questioned. Nor is it ever contended that Equity's power to punish for violation of its dignity or orders by contempt proceedings is not rightfully present. In fact, this power to punish for contempt has grown and expanded with Equity's broadening jurisdiction. Advancing civilization has become progressively more complex. Problems, legal as well as economic, social, and political, have increased in number and kind. Courts of law and equity are more and more frequently called upon and appealed to for determinations of a nature seldom if ever committed to their care in earlier legal history. The recurrent discussions of crowded dockets are ample testimony of the increasing importance of the judicial forces of any system of government.

Naturally, this very importance is reason for securing to the courts due and necessary respect and dignity, and to its decisions, obedience and proper execution. The power to cite and punish for contempt is so readily seen and accepted as a sufficient weapon for such security as to obviate any necessity for proof from reason or precedent.[1] But the very power which is sought so to insure justice

1. Dorrain v. Davis, 105 N.J.Eq. 147, 147 A. 338 (Ch. 1929).